

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SAMUEL J. SMOLEN, JR.,

Plaintiff,

v.

ORDER

08-CV-6144CJS

SGT. K. BERBARY, et al.,

Defendants.

Currently listed on the docket of the above-captioned case is a motion filed by the plaintiff on February 16, 2010, styled as a “Demand to Produce – Motion to Compel.” (Docket # 21). Examination of the document reveals that it is a request by plaintiff for the production of documents by defendants. Nothing in the docket suggests that the request had previously been served. Indeed, defendants timely served their response on March 18, 2010 and produced certain of documents requested by plaintiff; defendants objected to certain of the requests. (Docket # 23).

Although the Federal Rules of Civil Procedure permit a party to file a motion to compel another party to respond to a discovery request, such a motion may not be filed unless (1) the recipient has failed to respond or has provided incomplete responses to the discovery requests; and (2) the requesting party certifies that he has conferred in good faith with the resisting party in an attempt to obtain the discovery without the need for court intervention. *See* Fed. R. Civ. P. 37(a)(1) and (3)(B). Neither prerequisite has been satisfied in this case. The motion appears to have been filed prematurely before defendants had an opportunity to respond

to the document requests. *See, e.g., Bhuiyan v. Wright*, 2007 WL 2847208, *1 (N.D.N.Y. 2007) (denying as premature motion to compel where plaintiff failed to serve discovery requests prior to making the motion); *Lawrence v. Artuz*, 2001 WL 185039, *1 (S.D.N.Y. 2001) (same). Accordingly, and because defendants have since responded to the document requests, plaintiff's motion to compel (**Docket # 21**) is **DENIED**.

IT IS SO ORDERED.

s/Marian W. Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
June 21, 2010